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DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

6 CFR Part 5

Docket No. DHS-2017-0069

Privacy Act of 1974: Implementation of Exemptions; Department of Homeland Security/ALL-039 Foreign Access Management System of Records

AGENCY: Department of Homeland Security.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Homeland Security is giving concurrent notice of an updated and reissued system of records pursuant to the Privacy Act of 1974 for the “Department of Homeland Security/ALL-039 Foreign Access Management System of Records” and this proposed rulemaking. In this proposed rulemaking, the Department proposes to exempt portions of this system of records from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements.

DATES: Comments must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: You may submit comments, identified by docket number DHS-2017-0069, by one of the following methods:

- Federal e-Rulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Fax: 202-343-4010.

- Mail: Philip S. Kaplan, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, D.C. 20528.

Instructions: All submissions received must include the agency name and docket number for this notice. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: For general and privacy-related questions please contact: Philip S. Kaplan, Privacy@hq.dhs.gov, (202) 343-1717, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, D.C. 20528.

SUPPLEMENTARY INFORMATION:

I. Background:

The Department of Homeland Security (DHS) is proposing to update applicable regulations to exempt portions of an updated and reissued system of records from certain provisions of the Privacy Act. Specifically, this rule exempts portions of the “DHS/ALL-039 Foreign Access Management System of Records,” which is being proposed concurrently with this Notice of Proposed Rulemaking elsewhere in the Federal Register, from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements, pursuant to 5 U.S.C. 552a(k)(1), (k)(2), and (k)(5). Furthermore, to the extent certain categories of records are ingested from other systems, the exemptions applicable to the source systems will remain in effect.

DHS is publishing the system of records notice (SORN) to update the categories of individuals and modify the routine uses. In the original SORN, the categories of individuals indicated that dual U.S. citizens and lawful permanent residents (LPR) representing foreign interests were included. The SORN is being updated to indicate that all U.S. citizens representing foreign interests are included in the categories of individuals, not just dual U.S. citizens.

The SORN provides transparency on how DHS collects, uses, maintains, and disseminates information relating to foreign nationals who seek access to DHS and partner U.S. Government (USG) agency personnel, information, facilities, programs, research, studies, and information technology (IT) systems. The DHS Office of the Chief Security Officer (OCSO)/Center for International Safety & Security (CISS) Foreign Access Management (FAM) program uses the Foreign Access Management System (FAMS) to manage the risk assessment process for foreign nationals requesting access to DHS and partner agencies. DHS is responsible for conducting screening of all foreign nationals and foreign entities seeking access to DHS personnel, information, facilities, programs, and IT systems, including: U.S. citizens and lawful permanent residents (LPR) representing foreign interests; LPRs providing construction or contractual services (e.g., food services, janitorial services); and foreign contacts and foreign visitors reported by DHS and partner USG agency employees who have met and/or befriended such contacts and visitors outside the scope of the employee's official duties.

II. Privacy Act:

The Privacy Act embodies fair information practice principles in a statutory framework governing the means by which Federal Government agencies collect,

maintain, use, and disseminate individuals' records. The Privacy Act applies to information that is maintained in a "system of records." A "system of records" is a group of any records under the control of an agency from which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass U.S. citizens and lawful permanent residents. Additionally, and similarly, the Judicial Redress Act (JRA) provides a statutory right to covered persons to make requests for access and amendment to covered records, as defined by the JRA, along with judicial review for denials of such requests. In addition, the JRA prohibits disclosures of covered records, except as otherwise permitted by the Privacy Act.

The Privacy Act allows government agencies to exempt certain records from the access and amendment provisions. If an agency claims an exemption, however, it must issue a Notice of Proposed Rulemaking to make clear to the public the reasons why a particular exemption is claimed.

DHS is claiming exemptions from certain requirements of the Privacy Act for DHS/ALL-039 Foreign Access Management System of Records. Some information in DHS/ALL-039 Foreign Access Management System of Records relates to official DHS national security, law enforcement, immigration, intelligence activities. These exemptions are needed to protect information relating to DHS activities from disclosure to subjects or others related to these activities. Specifically, the exemptions are required to avoid disclosure of screening techniques; to protect the identities and physical safety of confidential informants and law enforcement personnel; to ensure DHS's ability to obtain information from third parties and other sources; to protect the privacy of third parties;

and to safeguard classified information. Disclosure of information to the subject of the inquiry could also permit the subject to avoid detection or apprehension.

In appropriate circumstances, when compliance would not appear to interfere with or adversely affect the law enforcement purposes of this system and the overall law enforcement process, the applicable exemptions may be waived on a case by case basis.

A notice of system of records for DHS/ALL-039 Foreign Access Management System of Records is also published in this issue of the Federal Register.

List of Subjects in 6 CFR Part 5

Freedom of information; Privacy.

For the reasons stated in the preamble, DHS proposes to amend chapter I of title 6, Code of Federal Regulations, as follows:

PART 5--DISCLOSURE OF RECORDS AND INFORMATION

1. Revise the authority citation for Part 5 to read as follows:

Authority: 6 U.S.C. 101 et seq.; Pub. L. 107-296, 116 Stat. 2135; 5 U.S.C. 301.

2. Amend appendix C to part 5 by adding paragraph 78:

Appendix C to Part 5 – DHS Systems of Records Exempt From the Privacy Act

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78. The DHS/ALL-039 Foreign Access Management System of Records consists of electronic and paper records and will be used by DHS and its components. The DHS/ALL-039 Foreign Access Management System of Records is a repository of information held by DHS in connection with its several and varied missions and functions, including, but not limited to the enforcement of civil and criminal laws; investigations, inquiries, and proceedings there under; and national security and

intelligence activities. The DHS/ALL-039 Foreign Access Management System of Records contains information that is collected by, on behalf of, in support of, or in cooperation with DHS and its components and may contain personally identifiable information collected by other federal, state, local, tribal, foreign, or international government agencies.

The Secretary of Homeland Security, pursuant to 5 U.S.C. 552a(k)(1), (k)(2), and (k)(5), has exempted this system from the following provisions of the Privacy Act: 5 U.S.C. 552a(c)(3); (d); (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I); and (f). When a record received from another system has been exempted in that source system under 5 U.S.C. 552a(j)(2), DHS will claim the same exemptions for those records that are claimed for the original primary systems of records from which they originated and claims any additional exemptions set forth here.

Exemptions from these particular subsections are justified, on a case-by-case basis to be determined at the time a request is made, for the following reasons:

- (a) From subsection (c)(3) (Accounting for Disclosures) because release of the accounting of disclosures could alert the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of that investigation and reveal investigative interest on the part of DHS as well as the recipient agency. Disclosure of the accounting would therefore present a serious impediment to law enforcement efforts and efforts to preserve national security. Disclosure of the accounting would also permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension, which would undermine the entire

investigative process. When an investigation has been completed, information on disclosures made may continue to be exempted if the fact that an investigation occurred remains sensitive after completion.

- (b) From subsection (d) (Access and Amendment to Records) because access to the records contained in this system of records could inform the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of that investigation and reveal investigative interest on the part of DHS or another agency. Access to the records could permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension. Amendment of the records could interfere with ongoing investigations and law enforcement activities and would impose an unreasonable administrative burden by requiring investigations to be continually reinvestigated. In addition, permitting access and amendment to such information could disclose security-sensitive information that could be detrimental to homeland security.
- (c) From subsection (e)(1) (Relevancy and Necessity of Information) because in the course of investigations into potential violations of federal law, the accuracy of information obtained or introduced occasionally may be unclear, or the information may not be strictly relevant or necessary to a specific investigation. In the interests of effective law enforcement, it is appropriate to retain all information that may aid in establishing patterns of unlawful activity.
- (d) From subsections (e)(4)(G), (e)(4)(H), and (e)(4)(I) (Agency Requirements) and (f) (Agency Rules), because portions of this system are exempt from the

individual access provisions of subsection (d) for the reasons noted above, and therefore DHS is not required to establish requirements, rules, or procedures with respect to such access. Providing notice to individuals with respect to existence of records pertaining to them in the system of records or otherwise setting up procedures pursuant to which individuals may access and view records pertaining to themselves in the system would undermine investigative efforts and reveal the identities of witnesses, and potential witnesses, and confidential informants.

Philip S. Kaplan,
Chief Privacy Officer,
Department of Homeland Security.

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